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Whether Sports Liability is an Independent Type of Legal Liability

Ph.D. Karina Zalcmane

ORCID: 0000-0002-4827-3425

The EKA University of Applied Sciences (EKA), Latvia

karina.zalcmane@gmail.com

Ph.D. Marina Kameņeckā-Usova

ORCID: 0000-0001-6040-8874

The EKA University of Applied Sciences (EKA), Latvia

marina_k.usova@yahoo.com

Abstract

Sport law as a highly developed complex branch of law regulates legal relations related to the subject of the different branches of law. Liability for violation of rights, non-performance or improper performance of duties is the basis of criminal, administrative, disciplinary and civil liability. However, there is another type of liability and sanctions provided for violation of sport rules. Nevertheless, no commonly accepted opinion has still been formed whether sports liability is a new type of legal liability or not.

Therefore, the aim of the research paper, through general scientific methods (monographic method, analytical method, historical method, comparative method, induction deduction) and methods of interpreting legal norms (grammatical, historical, teleological and systemic methods) is to determine the concept and content of sport liability. To reach the proposed aim, the authors of the study have formulated the concept and signs of sports liability, determined the types of a sports offense, analysed non-standard cases that outside the sports industry would not be subject to any liability and have identified main types of sports sanctions.

Keywords: disqualification, liability in sports, rules of sports, sports liability.

Introduction

Every type of sports has its own rules. Whether it is basketball, ice-hockey, badminton, football or rhythmic gymnastics. If there are rules of the game and rules for its conduct, there should be necessarily sanctions for violation of these rules. Such a “norm-sanction” system is quite common, a system that operates everywhere in society, whether it is a legal norm or a corporate one (Hall, 1961). Without sanctions, the mechanism of compliance with the rules is questioned, it becomes unviable (Schauer, 2010).

Simultaneously, along with quite clear and well self-regulated system, the industry of sports has shown the world a number of negative aspects. Sometimes excessive commercialisation and politicisation of the industry has led to a situation where the main Olympic creed “The important thing in the Olympic Games is not to win, but to take part; the important thing in Life is not triumph, but the struggle; the essential thing is not to have conquered but to have fought well” (The Olympic motto, n.d.) is often replaced by the motto “Victory at all cost!” (Cox, 2000). Among the common problems of modern sports, which lead to the replacement of mottos, are use of drugs and methods (doping) prohibited in sports, match-fixing, diverse betting fraud, profiteering with admission tickets, hooliganisms (especially in football), an increase in sports injuries, etc.

Therefore, to prevent the breach of not only the state laws, but internal national and international sports documents as well and promote the Olympic creed, a new type of liability – sports liability – was introduced in the sports industry. However, there is still no commonly accepted opinion whether sports liability is a new type of legal liability.

Therefore, the aim of the research paper, through general scientific methods (monographic method, analytical method, historical method, comparative method, induction deduction) and methods of interpreting legal norms (grammatical, historical, teleological and systemic methods) is to determine the concept and content of sport liability. To reach the proposed aim, the authors of the study have formulated the concept and signs of sports liability, determined the types of a sports offense, analysed non-standard cases that outside the sports industry would not be subject to any liability and have identified main types of sports sanctions.

1 Sports Liability: Concept and Signs

Sports industry as a self-regulated industry (Foster, 2012) has its own system of liability which is designed to ensure compliance with the rules established for all parties of sports relations (organisers of competitions, athletes, coaches, referees, etc.). Any type of sport has its own set of rules (Cambridge dictionary, n.d.). These rules are recognised to ensure fairness and impartiality of sporting events. Consequently, it can be argued that sports liability originates precisely from the rules of sports. Apart from the rules of

the game, in almost every sport, as it develops, there are certain rules of conduct that regulate activities of sports parties outside the sports field. Such rules may regulate, in particular, the order of transition of athletes, registration for participation in competitions, preparation of sports facilities for competitions, conditions for ensuring public order in the venues of sports competitions, observance of social/moral character of the athlete, etc. All of these rules require establishment of liability for non-observance, otherwise they simply will not be respected.

In accordance to theory of law, legal liability is the imposition of coercion by the state on offenders for an offense of a personal, material or organisational nature. The basis of legal liability is the fact of law infringement. Depending on the field of law infringed, a number of types of legal liability has been distinguished. Mainly there are four types of legal liability: civil, criminal, administrative and corporate.

Based on the signs of legal liability (Baikovs & Zariņš, 2012), it can be concluded that sports liability is not a legal liability since it does not rely on state coercion and the offender of sporting rules is not punished on behalf of the state.

Most researchers agree that sports liability could be a kind of corporate liability as it follows mainly from the norms contained in the rules for the conduct of sporting events, which in turn are developed and adopted by public sports organisations (Amirov, 2010). The National Collegiate Athletic Association (NCAA) in North America is an illustrative example of a sports body with vast regulatory powers and detailed rules of conduct often being criticised for bureaucracy in the name of amateurism. In serving as the regulatory body for intercollegiate athletic programmes, the NCAA establishes and enforces rules governing virtually every aspect of student-athlete experience and administration of intercollegiate athletics. These rules involve, often-times in excruciating detail, regulations concerning, *inter alia*, initial and continuing academic eligibility, recruitment of prospective student-athletes, financial aid and athletic scholarships, play and practice limits, bans on receipt of extra-benefits, and standards for amateurism. Due to its role in regulating intercollegiate athletics, the NCAA experiences its share of legal challenges. Each member institution is responsible for ensuring compliance with NCAA regulations and for self-reporting violations to the NCAA. Despite the rule entrusting competitors to self-report violations, the membership has, not surprisingly, provided for a formal process charging the professional enforcement staff within the NCAA to formally investigate allegations of rule violations and enforce liability for non-observance (Weston, 2011).

Despite this, the authors share the opinion of another group of scientists (Gardiner et al., 2005) and consider that sports liability is an independent type of legal liability.

Firstly, sports law contains special types of sanctions that are provided in the official documents of Sports Organisations and are recognised by the parties of international relations: disqualification of players, removal of judges, and others. For that reason, it might be concluded that there is specific, separate, new type of legal liability – sports

liability, as there are sanctions, that are recognised by states and are not covered by standard types of legal liability.

Secondly, the signs of sports liability are similar to the signs of legal liability (Panagiotopoulos, 2014):

- 1) it is provided by regulatory documents of sports federations and is of a delegated nature, i.e. in most countries the legislator establishes in national legal acts the possibility of establishing and applying sports sanctions by sports federations;
- 2) it occurs for the commission of offenses in the field of physical culture and sports, established by the rules of sport and regulatory documents of the sports federations;
- 3) it is based not on state coercion, but on recognition by the parties of sports relations of the possibility of sports federations to apply sports sanctions to them, i.e. sports liability depends on the fact of voluntary recognition – as long as the party is a participant of sports competitions and recognises the norms of the particular sports federation, they can be brought to sports liability;
- 4) it is expressed in certain unfavourable consequences for the offender, which are also established by sports federations, while such unfavourable consequences, as a rule, are associated with participation in sports competitions;
- 5) it is imposed and implemented in the procedural form established by the regulatory documents of the sports federation;
- 6) the offender is punished not on behalf of the state, but on behalf of the sports federation which established the norm that was violated.

Therefore, it is possible to formulate a definition of sports liability – it is application of coercive measures by a sports federation to a person who recognises norms approved by such sports federation for committing sports related offenses.

The authors believe that lack of common opinion is due to the fact that application of such sanctions is still not a measure of state coercion: sanctions for violation of sports rules are not contained in legislative acts. Therefore, the authors consider that the problem under consideration is caused by imperfection of sports related legislation.

2 Types of Sports Offenses and a Case Study

In the general theory of law, an offense is usually understood as an unlawful, guilty, punishable, socially dangerous act of a sane person that harms the interests of the state, society and citizens. A sports offense is also characterised by wrongfulness, guilt and punishment (Soek, 2006). Therefore, considering signs of sports liability stated above, a sports offense could be defined as an unlawful, guilty, punishable act in the form of action or inaction, prohibited by the rules of the sport or sporting regulations.

Types of sporting offenses may differ depending on a sport. Organisers of a competition in each sport independently determine unlawful acts, the commission of which is unacceptable and punishable. Hence, sports offenses can be grouped on several grounds:

1. According to documents prohibiting commission of a sports offense, the following types of sports offenses can be distinguished:
 - a) violation of the rules of the sport;
 - b) violation of sports regulations;
 - c) anti-doping rule violations;
2. According to the time of committing a sporting offense:
 - a) competitive, i.e. committed during the competition;
 - b) out-of-competition, i.e. committed not at the time of the competition, outside the sports ground;
3. Any other violations of rules related to sports:
 - a) violation of the established rules for organising a competition;
 - b) violation against health of participants of the competition;
 - c) violation against economic interests of the organisers of the competition etc.

Moreover, the authors would like to highlight that this is not the only possible way of grouping sports offences. For that reason, the authors will analyse two non-standard cases further that outside the sports jurisdiction would not be subject to any kind of liability, as there is no offence, apart from sports offence.

2.1 Carolina Kostner Case: a brief description of circumstances of the case

Carolina Kostner, born February 8, 1987, is an Italian figure skater. She is the 2008 World silver medalist and the 2007, 2008 European champion and the 2007–2008 and 2008–2009 Grand Prix Final Bronze Medalist (Carolina Kostner official site, n.d.).

When on 30 July, 2012, a Doping Control Officer (DCO) attempted to conduct a doping control on Kostner's then partner, Alex Schwazer (born November 26, 1984, Italian Olympic Champion in race walking) at the premises of Kostner, she falsely advised the DCO that Schwazer was not at her house.

Kostner has since recognised that she committed a serious error of judgement by misleading the DCO, admitting the lies to DCO also accepting the fact that her conduct violated the Italian Anti-Doping Rules (Ranjan, 2015).

Schwazer tested positive for erythropoietin (EPO)¹ ahead of the London 2012 Olympics, sparking an investigation into suspected organised doping by the Public Prosecutor of Bolzano (Brown, 2014).

¹ Schwazer faced a CONI hearing on 20 November to appeal a three-and-a-half-year ban imposed by CONI in April 2013 – the outcome of that hearing is unknown. Interestingly, Schwazer's ban is nine months shorter than that proposed for Kostner. He told media that he had lied to Kostner about EPO stored in a fridge, telling her it was vitamin B12. After failing an out-of-competition test ahead of London 2012, Schwazer was removed from Italy's team and quit race-walking.

Anti-Doping Prosecutor's Office referred the athlete Kostner (affiliated with The Italian Ice Sports Federation) to the Second Chamber of the National Anti-Doping Tribunal of Italian Olympic Committee (CONI) for recognition of liability upon the violation of Art. 2.8 and 3.3 of Italian Anti-Doping Rules, on the basis of the documents sent by the Public Prosecutor of Bolzano – within the inquiry called "Olimpia" and the outcome of investigations carried out by the Anti-Doping Prosecutor's Office in the field of sports, with demand for 4 years and 3 months disqualification (CONI, 2014). Article 2.8 prohibits athletes from "encouraging or helping, instigating, concealing or providing any other type of complicity with respect to any violation, or attempted violation, of the NSA". Article 3.3 allows CONI to sanction athletes for "non-cooperation on the part of any person regarding compliance with the NSA, including failure to report the circumstances relevant to the assessment of the facts of doping" (Italian Anti-Doping Regulations, 2014).

Kostner was banned to compete for 16 months.

2.2 CAS arbitration

In March, 2015, the Court of Arbitration for Sport (CAS) registered two appeals against the decision issued by the Italian National Anti-Doping Tribunal (TNA) in the case of the figure skater Carolina Kostner.

Kostner herself had appealed the decision, principally seeking its annulment and declaration that she did not commit any breach of the anti-doping rules.

The second appeal was filed by the CONI whose Anti-Doping Prosecution Office seeks to increase the period of ineligibility to two years. Two arbitration procedures were in progress and conducted by CAS in compliance with the Code of Sports related Arbitration (Kostner vs Italian Anti-Doping Tribunal, 2015).

In October, 2015, CAS issued a consent award in the disciplinary case relating to an alleged violation of the Italian Anti-Doping Rules by Kostner. The settlement agreement reached by the parties was embodied in the consent award which concluded the CAS arbitration.

Kostner was made eligible to compete as from the beginning of 2016. The parties agreed to increase the sixteen-month sanction imposed at first instance by the Italian National Anti-Doping Tribunal by five months. The resulting twenty-one-month ineligibility period was backdated to 1 April, 2014 based on procedural delays that were not attributable to Kostner. Carolina Kostner was therefore made eligible to compete from 1 January, 2016 (Kostner vs Italian Anti-Doping Tribunal, 2015).

This case received a lot of publicity in the press due to the fact that an honored athlete was banned from representing its country in the international arena for such a long period of time because of an error of judgment that mislead the DCO. The case illustrates several types of sports liability described above.

2.3 Neymar Da Silva Santos Jr Case: a brief description of the circumstances of the case

Neymar da Silva Santos, Jr. (Neymar), born February 5, 1992, is a Brazilian football player who is one of the most prolific scorers in football history. In June 2013, Neymar signed a five-year contract with FC Barcelona in exchange for €57 million one of the most expensive football transfers in history.

In August 2017, he engineered a departure to the French club Paris Saint Germain (PSG) for a then record €222 million transfer fee. Neymar also became the highest-paid player in the world, with a €45 million annual salary (Rollin, 2018).

As stated in the decision of CAS in Paris Saint-Germain & Neymar Da Silva Santos Junior vs Union des Associations Européennes de Football (UEFA), Paris Saint Germain (PSG) is a successful French football club associated to the French Football Federation. French Football Federation is associated to Union des Associations Européennes de Football (UEFA).

In 6 March, 2019, PSG played at its own stadium against FC Manchester United. The match was the second leg of the UEFA Champions League round of 16 fixture (the Match). PSG had won the first leg on 12 February, 2019 by two goals to nil.

Neymar did not participate in the Match due to an ankle injury. He attended the Match as a spectator, watching from a part of the stadium reserved for player and team officials.

In the first half of the Match Manchester United scored a goal in the second minute. PSG scored the second goal in the twelfth minute, making the aggregate score 3-1 in favour of PSG. In the thirtieth minute, Manchester United scored again making the aggregate score 3-2 in favour of PSG. In the first minute of the added time in the second half, Diogo Dalot from Manchester United took a shot at PSG's goal. The shot was blocked by one of the PSG's players, Presnel Kimpembe. The referee signaled for a corner kick to Manchester United. A few seconds later, however, the referee halted the play and indicated that he had been contacted by the Video Assistant Referees ("VAR") who had recommended that he review the video footage of the blocked shot. The referee reviewed the footage on the pitch-screen for about 60 seconds. After concluding his review, the referee awarded a penalty to Manchester United. Some of the players of the PSG remonstrated with the referee and there was a clash between some of the PSG's and Manchester United's players. The penalty was converted by Manchester United resulting in an aggregate score of 3-3. In view of Manchester United's three away goals vis-à-vis the Club's two away goals scored in the first leg, Manchester United proceeded to the next round of the competition whereas the PSG was eliminated from the tournament.

Shortly after the Match, Neymar posted an image of the blocked shot to his Instagram story accompanied by the following statement in Portuguese ("the Statements"):

“Isso é uma vergonha!! Ainda colocam 4 caras que não entendem de futebol pra ficar olhando lance em camera lenta ... Isso não existe!!! Como o cara vai colocar a mão de costas? Ah vá pá pqp.”

Neymar's post on Instagram immediately was widely recognized, reported and commented on by the international press. Neymar had approx. 110 million followers on Instagram and a posted story was seen by 20 % of his followers, constituting for more than 20 million people. At the post-Match press conference, e.g., the coach of PSG was promptly asked about the Statements. He responded as follows:

“Sometimes when you remember yourself in a big, big fight and being very emotional sometimes you use words and you react in a way that you take back some hours later [...] so don't be too harsh on him. I would not over-interpret the use of his words in the heat of the challenge and the moment of the decision. It is quickly typed into a smartphone [...].”

2.4 The Proceedings within UEFA

On 13 March, 2019, the UEFA Ethics and Disciplinary Inspector (EDI) initiated a disciplinary investigation with regard to Neymar's Statements. On 14 March, 2019, the EDI notified Neymar and PSG of the investigation. The Appellants were invited to state their position in the matter.

PSG and Neymar submit that the Statements translate as follows:

“It's a disgrace!! They've actually put four guys who do not know anything about football to just stand and watch the kick in slow motion ... Are they for real?!! How is the guy going to put his hand on his back? Oh, for [God's] OR [f**k's] sake!”

UEFA submits the following translation for the Statements:

“This is a disgrace!! They put four guys who know nothing about football to watch the incident in slow motion ... It can't be!!! How can he handle the ball when his back's turned? Oh, go f**k yourselves!”

On 22 March, 2019, UEFA informed PSG that disciplinary proceedings had been initiated in accordance with Article 55² of the UEFA Disciplinary Regulations (DR).

On 25 April, 2019, the UEFA Control, Ethics and Disciplinary Body (CEDB) took a decision whereby it ruled to suspend the PSG player Neymar for three UEFA competition matches for which he would be otherwise eligible, for insulting match officials.

PSG and Neymar filed an appeal against the decision of the CEDB with the UEFA Appeals Body but it was rejected.

² The opening of the proceedings by the UEFA administration.

2.5 CAS arbitration

On 18 July, 2019, PSG and Neymar (the Appellant) filed an appeal against the UEFA (the Respondent) with CAS with respect to the Appealed Decision.

Merits of the case were as follows:

1. What is the correct translation of the Statements?
2. Is the content of the Statements sanctionable under Article 11³ and/or Article 15⁴ DR?
3. If Article 15 DR is applicable, is the content of the Statements directed towards “match officials”?
4. If the aforementioned question is answered in the affirmative, is the content of the Statements abusive within the meaning of Article 15(1) lit. b or insulting according to Article 15(1) lit. d DR?
5. Are there any mitigating/aggravating factors to be considered when imposing the correct sanction?

After interpretation of the Statements and its correct translation, the Sole Arbitrator was confirmed in his view when looking at the response to the Statements in the mass media. It appeared that the press unequivocally interpreted the expression “*Ah vá pá pqp*” in the sense of “*Go f**k yourself / yourselves*”.

³ Article 11 General principles of conduct

1. Member associations and clubs, as well as their players, officials and members, and all persons assigned by UEFA to exercise a function, must respect the Laws of the Game, as well as UEFA's Statutes, regulations, directives and decisions, and comply with the principles of ethical conduct, loyalty, integrity and sportsmanship.
2. For example, a breach of these principles is committed by anyone:
 - a. who engages in or attempts to engage in fraud, active or passive bribery and/or corruption;
 - b. whose conduct is insulting or otherwise violates the basic rules of decent conduct;
 - c. who uses sporting events for manifestations of a non-sporting nature;
 - d. whose conduct brings the sport of football, and UEFA in particular, into disrepute; e. who does not abide by decisions or directives of the UEFA Organs for the Administration of Justice, or decisions of the Court of Arbitration for Sport involving UEFA as a party or between at least two UEFA members associations;
 - f. who does not comply with instructions given by match officials;
 - g. who does not pay for tickets received from another club or national association;
 - h. who culpably reports late – or not at all – for a match, or is responsible for a late kick-off;
 - i. who culpably causes a match to be interrupted or abandoned, or is responsible for its interruption or abandonment;
 - j. who enters a player on a match sheet who is not eligible to play.
3. Breaches of the above-mentioned principles and rules are punished by means of disciplinary measures.

⁴ Article 15 Misconduct of players and officials

The following suspensions apply for competition matches: <...>

- b. suspension for two competition matches or a specified period for directing abusive language at a match official; <...>
- d. suspension for three competition matches or a specified period for insulting any match official; <...>

Also, the Scope of Application of Article 11 and Article 15 DR was considered, where the Sole Arbitrator stated the following:

Article 15 DR is clearly applicable to the Player's Instagram post. The Player posted the Statements onto his Instagram story while he was still in the stadium, i.e. only minutes after the end of the Match. The media picked up the Statements at a very early stage, i.e. before the press conference began. At the press conference the Club's Coach was asked to comment on the Player's Statements. Consequently, the Sole Arbitrator finds that the criterion of a close nexus between the behaviour in question and the "competition match" is fulfilled. In this context it is irrelevant that the Player was not fielded to play in the Match due to an injury. He attended the Match in the stadium, was in the official stands of the Club and in that function was bound to observe the duties of loyalty of a player within the meaning of Article 15 DR, which are duties that go beyond the obligations imposed on a mere "fan" or the "general principles of conduct" expected of a player.

What clearly tips the scale, and turns the Statements into a breach of Article 15(1) lit. b DR is the final sentence ("Ah vá ..."). Such an outburst is absolutely unacceptable, independently of the circumstances of the individual case, i.e. the emotions involved, the significance and scope of the decision at stake and/or the questionableness of said decision.

Based on the mentioned considerations, CAS ruled that (1) the appeal filed by PSG and Neymar against the Decision of the UEFA Appeals Body dated 18 June, 2019 is partially upheld and (2) the PSG player Neymar is suspended for two UEFA competition matches for which he would be otherwise eligible (PSG & Neymar vs UEFA, 2020).

3 Sports Sanctions: Concept and Types

Previously the authors have already mentioned that in Sports industry there are specific sports related sanctions which are recognised by almost all states. Sports sanctions, such as sports liability, have not been sufficiently studied in the legal literature. In this subsection, the authors will try to formulate its definition and types.

In regards to the definition of a term "sports sanction", there is a consent between Eastern (Prokopec, 2007) and Western (Vieweg, 2004) European researchers that propose to recognise sports sanctions as a kind of corporate sanctions related to a clearly defined group of persons that make up this corporation. That means, sports sanctions are of a civil nature – a person who is part of a corporation performs a certain type of action, thus assuming all the rights and obligations that are characteristic of a member of this corporation.

Therefore, the authors consider that sports sanction could be defined as a measure of liability of party/parties of sports relationships for committing a sports offense, applied by the decision of an authorised body of the organiser of the sports competition, or by the decision of a sports judge.

Sports sanctions vary from sport to sport. Sports sanctions are usually divided into two types on the basis of time – current and subsequent (Zajcev, 2013). Current sports sanctions are sanctions imposed and enforced by a referee of a sporting event directly during the event, which do not require a jurisdictional decision to take effect (e.g. warning, free kick, etc.). Subsequent sports sanctions are sanctions imposed by specially created jurisdictional bodies of the organisers of the competition (e.g. FIFA Disciplinary Committee) which are applied not only to direct participants of the competition, but also to other parties of sports relationships (sports clubs, coaches, doctors and other specialists in the field of physical culture and sports). Subsequent sports sanctions are applied for violations committed not only during sports competitions, but also in other situations provided for by sports regulations.

As mentioned above, the types of sports sanctions, firstly, vary from sport to sport; secondly, differ in accordance to offence committed. For that reason, in order to determine possible types of sports sanction, the national or international federation disciplinary regulations have to be considered.

In accordance to Latvian Football Federations Disciplinary regulation Art. 1.5. and 1.6., in Latvia, for example, there are following sanctions that shall be applied **to natural persons:**

- a) warning;
- b) fine;
- c) exclusion;
- d) ban on changing rooms and/or reserve bench;
- e) ban on being in the stadium;
- f) ban on taking part in any football-related activities;
- g) withdrawal of awards;
- h) training for appropriate behavior;

and **for a legal person:**

- a) warning;
- b) fine;
- c) ban on player transfers;
- d) organisation of a match without spectators;
- e) holding a game on a neutral pitch;
- f) ban on registering new players;
- g) cancellation of the game result;
- h) exclusion from the competition;
- i) award of loss;
- j) deduction of points;
- k) relegation;
- l) withdrawal of prizes
- m) prohibition to play in a particular stadium;
- n) resumption of play (Latvian Football Federations Disciplinary regulation, 2020).

Conclusion

The authors have considered only a few aspects related to sports liability: concept and signs of a term “legal liability” and types of sports offenses and sanction. Undoubtedly, the issue of sports liability is a matter of future research.

Nevertheless, it could be already pointed out that at this moment mostly sports liability is not yet considered as a separate type of legal liability, rather a type of a corporate liability. However, the authors believe that this is a matter of time, and the solution of this issue depends directly on improvement and/or codification of sports legislation.

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